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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

JAMES D. HUBBARD, )  
 ) PCHB NO. 93-73  
and )  
 )  
JOHN H. HUBBARD, ) PCHB NO. 93-103  
 )  
Appellants. )  
 ) FINAL FINDINGS OF FACT,  
v. ) CONCLUSIONS OF LAW  
 ) AND ORDER  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
 )  
Respondent. )  
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The two cases captioned above were consolidated for hearing before the Pollution Control Hearings Board ("Board"). Each represents an appeal of a denial by the State Department of Ecology ("Ecology") of an application to appropriate groundwaters of the State in Wagon Road Coulee, Okanogan County.

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A hearing was held on February 28, 1994, in Lacey. Present for the Board were Richard Kelley, who presided, and Robert Jensen, Board Chairman. Representing the parties were W. Scott DeTro, attorney, for James and John Hubbard (collectively, "Hubbard"), and Jo Messex Casey, Assistant Attorney General, for Ecology. The proceedings were recorded by Louise Becker, of Gene Barker and Associates, Olympia.

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Witnesses were sworn and heard. Exhibits were introduced and examined. The arguments of the parties were considered by the Board. Based on all of the above, the Board makes the following

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FINAL FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER  
PCHB NOS 93-73 & 93-104

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2 **FINDINGS OF FACT**

3 **I.**

4 The properties owned by Hubbard are in Wagon Road Coulee, near the Okanogan  
5 River and the town of Riverside, Okanogan County. The Coulee is naturally arid, with a  
6 number of farms and orchards using groundwater for irrigation, frost protection, stock  
7 watering and domestic uses.

8 **II.**

9 The southerly two-thirds of the Coulee straddles an aquifer, Wagon Road Coulee  
10 Aquifer, which flows generally South as the land declines in elevation from the point of influx  
11 of Pine Creek toward Riverside and the Okanogan River and its underlying Okanogan River  
12 Aquifer. The Coulee runs roughly parallel the River, separated by Short Mountain. Wagon  
13 Road Coulee Aquifer is a water table aquifer whose level is higher at the Pine Creek end and  
14 lower at the Riverside end.

15 **III.**

16 The Hubbard well sites are approximately 4,000 feet and 5,700 feet, respectively, line-  
17 of-sight from the River. The Hubbards presently use modest amounts of water for irrigation  
18 and frost protection for orchards and for stock watering and domestic use. The applications in  
19 question would authorize much greater withdrawals.

20 **IV**

21 Application No. G4-29939, filed February 21, 1989, requested 1,840 maximum  
22 gallons per minute (gpm), and a maximum 184.3 acre feet per year, with 151.8 acre feet to  
23 irrigate 46 acres of orchard from April 1 to October 31, and the remaining 32.5 acre feet for  
24 frost protection. Ecology's Report of Examination, issued April 5, 1993, approved 460 gpm.

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2 and 151.8 acre feet per year to irrigate 46 acres of orchard from April 1 to October 31, and  
3 1,840 gallons per minute and 32.5 acre feet per frost season for frost protection of 46 acres.

4 Application No. G4-30220, filed March 30, 1990, requested 1,200 gpm for irrigation  
5 of 140 acres of orchard, hay and pasture, and domestic supply. On April 2, 1993, Ecology  
6 issued a Report of Examination approving 1,190 gpm and 713.2 acre feet per year for  
7 irrigation of the 140 acres from April 1 to October 31, plus 10 gpm and 1 acre-foot per year  
8 for continuous domestic supply.

9 Both Ecology Reports of Examination conditioned the approvals on maintenance of the  
10 base instream flow in the Okanogan River, as established by WAC 173-549. The instream  
11 flow measurement is done on a continuous basis at Monitoring Station 12.4472.00 (Malott-  
12 Lower Okanogan) at River Mile 17.0, Section 9, Township 32 N, Range 25 E.W.M.

13 V.

14 James Hubbard filed appeal PCHB No. 93-73, and John Hubbard filed appeal PCHB  
15 No. 93-103, which were consolidated for hearing by Board order on June 8, 1993.

16 VI.

17 The confluence of the Wagon Road Aquifer with the Okanogan River and its aquifer is  
18 not a neat and precise point, but rather a complex phenomenon involving multiple channels  
19 and depths, varying layers of soil types, and differential pressure gradients within and between  
20 aquifers. Finding one point at which the two conflow is not necessary or relevant to the  
21 Board's inquiry. Richert v. Department of Ecology, PCHB No. 90-158 (1991).

22 VII.

23 There is no apparent barrier in the area around Riverside to prevent the confluence of  
24 the Wagon Road Aquifer and the Okanogan River and Aquifer. The level of the water in the  
25 Wagon Road Coulee Aquifer is higher than in the River. There is no other outlet than the  
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2 River and its Aquifer for the water seeping southward through the Wagon Road Aquifer.  
3 Whether water enters the River directly or flows first into the underlying aquifer, it eventually  
4 discharges into the River. This is common to a number of aquifers in the Okanogan River  
5 basin.

6 We find that significant hydraulic continuity exists between the Wagon Road Coulee  
7 Aquifer and the Okanogan River.

8 VIII.

9 Any conclusion of law deemed to be a finding of fact is adopted as such.

10 Based on the above findings of fact, the Board makes the following

11  
12 CONCLUSIONS OF LAW

13 I.

14 The Board has jurisdiction under RCW 43.21B.

15 II.

16 In 1976, Ecology adopted the Okanogan River Basin Plan, incorporating into State law  
17 as WAC 173-549. The Plan established minimum instream flows in all perennial rivers and  
18 streams in the Okanogan basin, including the Okanogan River, to protect instream values for  
19 the public interest. If groundwater extraction affects the regulated streams, it is subject to the  
20 same restrictions. WAC 173-549-060.

21 III.

22 RCW 90.03.290 obligates Ecology to make four determinations in considering a water  
23 right application: 1) whether water is available to be appropriated; 2) whether the proposal is  
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2 for a beneficial use; 3) whether it will impair existing rights; 4) whether it will detrimentally  
3 affect the public welfare.

4 IV.

5 Ecology determined that the first three conditions were met, but that the requested  
6 permit would detrimentally affect the public welfare unless existing rights, including the base  
7 flow in the Okanogan River, were protected.

8 V.

9 The burden of proof lies with the Appellant to show, by a preponderance of the  
10 evidence, that Ecology has erred in reaching its determination. In re Ballestrasse and Chaves  
11 and Assoc., PCHB Nos. 78-51 (1978).

12 VI.

13 The distance of the proposed appropriations from the Okanogan River is irrelevant.  
14 Ecology is required to consider the impact of any appropriation from a source in hydraulic  
15 continuity with the Okanogan River, and they have properly done so.

16 VII.

17 Appellant has failed to meet his burden of proof that Ecology erred in its  
18 determination.

19 VIII.

20 Any finding of fact deemed to be a conclusion of law is adopted as such.

21 Based on the findings and conclusions above, the Board enters this  
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ORDER

1. The appeal of James Hubbard, PCHB No. 93-73, is denied.
2. The appeal of John Hubbard, PCHB No. 93-103, is denied.
3. The Reports of Examination issued by Ecology on April 2, 1993 and April 5, 1993, regarding the Hubbard applications, are affirmed.

DONE this 12th day of April, 1994, in Lacey, Washington.

POLLUTION CONTROL HEARINGS BOARD

  
RICHARD C. KELLEY, Presiding

  
ROBERT V. JENSEN, Chairman

P93-73F